United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-7161

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-7161

BOSTON M. CHANCE, LOUIS C. MERCADO, et. al.,

Plaintiffs-Appellees

-against-

THE BOARD OF EXAMINERS, et. al.,

Defendants,

-and-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant-Appellant,

-and-

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Intervenor-Appellant.

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P/S

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Plaintiffs-appellees Boston M. Chance, Louis C. Mercado, et al., (hereinafter, "plaintiffs"), hereby petition the Court for rehearing and reconsideration of its decision entered January 19, 1976 reversing an order of the District Court. That order limits the application of the principle of "last hired, first fired" to assure that the burdens of "excessing", i. e.,

transfers and layoffs, of school supervisory personnel do not fall disproportionately upon members of plaintiffs' class who were discriminatorily denied the opportunity to accrue seniority by the use of unconstitutional examinations. Its purpose was to insure that the remedial relief previously entered -- and upheld on appeal to this Court -- as a result of the Court's finding that defendants' system for selecting supervisory personnel was unconstitutionally discriminatory, was not entirely vitiated by operation of defendants' "excessing" rules.

Plaintiffs request that, upon rehearing, the Court affirm the order of the District Court or, at a minimum, remand the cause with instructions to fashion a different order which will give plaintiffs' entire class relief from the effects of past discrimination. Plaintiffs further respectfully suggest that inasmuch as the panel's decision is in irreconcilable conflict with other decisions of this Court, and involves important questions of public policy and judicial administration, this matter be reheard en banc.

Statement of the Case

This action was commenced in September 1970 by plaintiffs challenging the examinations used to select supervisory personnel in the New York City school system on the ground that those examinations discriminated unconstitutionally against minority groups. It was brought under 42 U.S.C. §§ 1981 and 1983, and not under Title VII of the Civil Rights Act of 1964,

42 U.S.C. §§2000e et seq, which did not become applicable to state or local governmental employees until March 24, 1972, Pub. L. 92-261, 86 Stat. 103. After extensive proceedings, the District Court granted plaintiffs' motion for a preliminary injunction, finding that the examinations had a disproportionate adverse impact upon minorities and could not be justified as job-related. Chance v. Board of Examiners, 330 F.Supp. 203 (S.D.N.Y. 1971), aff'd, 458 F.2d 1167 (2nd Cir. 1972) (Chance I).

Extensive negotiations and additional proceedings resulted in the entry, on July 12, 1973, of a final judgment against the defendant Board of Examiners and a modified preliminary injunction against the defendant Board of Education containing parallel provisions.[1/] These orders, upheld by this Court in Chance v. Board of Education, 496 F.2d 820 (2d Cir. 1974) (Chance II), mandated the development of a permanent new selection procedure and the institution of an interim system for appointment and licensing of supervisory personnel. Under the interim procedure, which is still operative, no final selection procedure having yet been developed, supervisors can be licensed if they have filled a vacancy on an acting basis for at least five months and are found by the Board of Examiners to have performed satisfactorily (See pp. 310a-313a, Appendix to Brief of Appellant Board of Education in No. 73-2320).

1/ These orders are set forth at pp. 274a-316a of the Appendix to the Board of Education's brief on appeal to this Court in No. 73-2320.

A few months after the entry of the July 12, 1973 orders, the Board of Education directed community school boards to fill supervisory vacancies in accordance with the "transfer list" provisions of its contract with the Council of Supervisors and Administrators ("CSA"). These provisions required that persons who had acquired seniority with licenses obatined under the old examination system be granted priority in consideration for all supervisory vacancies. The District Court held that "the transfer provisions . . . by giving preference to senior supervisory personnel, violate our Orders," in that they "reward the very discriminatory practices which we have outlawed." Chance v. Board of Examiners, 7 EPD ¶9084 at p. 6576. The union's appeal from a later order declining to rescind this order was dismissed. Chance v. Board of Education, 497 F.2d 919 (2nd Cir. 1975) (Chance III).

In July 1974 the Board of Education submitted proposed rules to govern the "excessing" of school supervisors. These rules would have required that supervisory personnel whose positions are abolished, and those persons junior to them holding similar or lower positions, be relocated, demoted or terminated in inverse order of their seniority. The Board of Education failed to supply precise evidence as to either present minority representation among supervisory personnel or the impact of "excessing" upon plaintiffs' class.. Neither the Board of Education nor the union took issue with plaintiffs' assertion

that implementation of the seniority rules would have a disproportionately adverse impact upon minority supervisors.

On November 22, 1974 Judge Tyler entered an order freezing the application of seniority excessing rules at the point where the proportion of blacks and Hispanics excessed would reduce their present representation in each school district and in the school system as a whole (327a-333a)[2/]. This order was modified in no relevant respect by the order of February 7, 1975, and defendant Board of Education and intervenor CSA appealed.

The Panel's Opinion

A majority of the panel reversed the District Court's order and held that the excessing limitation which the District Court imposed, and which the panel characterized as a quota, was improper. Judge Oakes dissented in an opinion which clearly demonstrates the false premises on which the majority opinion was based, as well as its inconsistency with the law as previously enunciated in other decisions of this Court.

Grounds for Rehearing

As Judge Oakes' opinion makes clear, the majority opinion appears to be based, at least in part, on the incorrect premise that the only persons injured by defendants' past discrimination were those who took and failed supervisory exams. Slip op. at 6599-6600 . In fact, the class found by the District Court to have been injured is much broader. This incorrect

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2/ This form of citation is to pages of the Joint Appendix in this appeal.

premise leads the majority to the conclusion that the relief accorded went far beyond the actual victims of discrimination. In fact, as Judge Oakes makes clear, the breadth of the class injured is what makes difficult the designing of relief that identifies and properly compensates each victim of discrimination. This difficulty in according "perfect justice" makes Judge Tyler's solution probably the best approximation of "rough justice" that can be found. And it clearly appears to be the only administratively feasible relief. Slip op. at 6598-6600, 6606-6614. The fact that this was Judge Tyler's assessment, after careful deliberations based on the submission by the parties of numerous different proposed orders and after numerous hearings on the issue, cannot properly be ignored by this Court.

The majority's characterization of Judge Tyler's order as "reverse discrimination" is totally inapposite and again based on false factual assumptions. As Judge Oakes points out, the white supervisors who may be excessed pursuant to Judge Tyler's order are persons who hold their positions by virtue of examinations found by this Court to have been unconstitutionally discriminatory. Slip op. at 6604-6605. The minority persons protected by the order are, on the other hand, persons who obtained their positions by virtue of the court-ordered interim selection system which was designed to operate as a job-related procedure based on on-the-job performance. Chance v. Board of Examiners, 6 EPD ¶8976 at 6144, aff'd 496 F.2d at 822-824, (Chance II).

The majority entirely ignores the fact that it is dealing with a remedial order, designed to protect the integrity of the Court's earlier remedial orders. Slip op. at 6598-6599, 6603-6606, 6608-6610. The opinion is written as if it were dealing with an order outlawing a seniority system in the absence of any proof of past discrimination Slip. op. at 6589, 6593-6594. On the basis of these unfounded premises the majority arrives at a result entirely inconsistent with the law in this Circuit -- a result which apparently outlaws the use of any kind of quota regardless of the circumstances.

Less than two months ago this Court had before it a petition for rehearing en banc in Kirkland v. New York State Department of Correctional Services, Nos. 74-2116, 74-2258 (December 10, 1975). In Kirkland a panel of this Court ruled that the imposition of a quota was both constitutionally and legally proper provided there was clear-cut proof of past racial discrimination. 520 F.2d 420. The panel explicitly referred to Chance as containing the evidence required to sustain a quota, evidence which it found to be absent in Kirkland:

> A comparison of respondent's proof with that considered by then District Judge Mansfield in Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), aff'd, 458 F.2d 1167 (2d Cir. 1972) is illuminating. Judge Mansfield's opinion shows that he reviewed the pass-fail statistics from fifty supervisory examinations taken by six thousand, two hundred and one candidates over a seven-year period to ascertain the relevant racial; and ethnic groupings. In the instant case, the litigation centered on one.

520 F.2d at 428.

A majority of this Court concluded that this was both correct and consistent with the other decisions of the Court, and therefore voted to deny rehearing en banc. Each member of that majority, except for the original panel members in Kirkland itself, were thoroughly familiar with Chance, having heard earlier appeals in that case.

This is the same Chance v. Board of Examiners discussed in Kirkland. On January 19, 1975, a panel of this Court concluded that a quota could not be imposed in this case, apparently reasoning that quota relief was impermissible despite the "clear-cut pattern of long-continued and egregious racial discrimination" proven in this case. The panel decision in this case is clearly inconsistent with the panel decision in Kirkland. If, as a majority of this Court believed in December, Kirkland was both correct and consistent with the past decisions of this Court, then the instant decision cannot be.

The Court in Kirkland further held that, even in the absence of special proof of past discrimination, a quota could be ordered as an interim measure until a court-approved job-related exmmination was developed, 520 F.2d at 429-430. The quota in this case is just such an interim measure. A final selection procedure has not yet been completed. The persons affected by the quota in this case were appointed either on

the basis of their performance on non-job related examinations or in accordance with the interim selection procedure approved by this Court in Chance II. The District Court's limitation on excessing will expire in November, 1977 (407a).

As Judge Mansfield noted in his opinion outlawing the transfer provisions of the union contract which gave preference in accordance with seniority for the filling of supervisory vacancies,

> Following the adoption of a permanent non-discriminatory system for the selection of supervisors in the New York City School System there will undoubtedly come a time when seniority among those selected under such a system can be appropriately recognized. To give preference to those appointed under a discriminatory testing system, however, which is the effect of the CSA agreement's transfer provisions, would be to reward the very discriminatory practices which we have outlawed.

7 EPD at p. 6575.

The Kirkland quota which was struck down was held to be inconsistent with the merit system because the Court thought it would require a preference for less qualified minority employees, 520 F.2d at 428, 430. In this case, however, members of plaintiffs' class benefitted by the Tyler order were licensed on the basis of meaningful on-the-job evaluations, whereas most of the white supervisors were chosen on the basis of examinations which the District Court found were no "better than drawing names out of a hat", 458 F.2d 1167, 1175. There is therefore every reason to believe that Judge Tyler's excessing order will serve to insure retention of the most qualified

supervisors, which is precisely what Kirkland sought.

Appellees recognize that panels in a court of appeals are often composed differently, a fact which invariably produces some differences in approach. In the instant case, however, the ink in Kirkland, approving quotas based on interim selection procedures or where there is past discrimination as in Chance, was barely dry when the panel in this case held otherwise. The confusion among the District Courts caused by these two decisions must be resolved by this Court sitting en banc.

To the extent that the panel decision rejects the excessing quota on the ground that it would benefit some who were not personally victims of particular past discriminatory acts,[3/] it squarely conflicts with five cases previously decided by this Court in which it approved quotas which were intended to and did in fact benefit minority group members who were not past victims in this sense. United States v. Wood, Wire & Metal Lathers, Local 46, 471 F.2d 408, cert. denied, 412 U.S. 939 (1973); Vulcan Society v. Civil Service Commission, 490 F.2d 387 (1973)); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (1973); Rios v. Enterprise Association Steamfitters, Local 638, 501 F.2d 622 (1974);

3/ "'[T]here was an express intent [in Title VII] to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of discrimination'. . . The relief fashioned by the court below was not designed to benefit only those affected by the employer's discriminatory conduct . . ." Slip op. at 6594-96.

and Patterson v. Newspaper and Mail Deliverers' Union, 514 F.2d 767 (1975). Surely a district court in this Circuit, confronted by a request for a quota whose benefits might extend to minority group members not personally injured by past discriminatory conduct would be at a loss to discern what the rule in this Circuit now requires.

Other language in the panel's decision suggests it may have thought quota relief for non-victims generally permissible, but not in a layoff situation. The panel relied heavily on decisions in other circuits that 42 U.S.C. §2000e-2(h) protects any seniority system not created with a discriminatory purpose, and that this limitation should be read into 42 U.S.C. §1981 and 1983.[4/] There is, as the panel recognized, a disagreement among the circuits regarding §2000e-2(h). More significantly both the panel's reading of §2000e-2(h) and its applicability to §1981 cases, are issues now before the Supreme Court in Franks v. Bowman Transportation Co., No. 74-728. Franks was argued on November 3, 1975, and a decision can be expected within a matter of months. To the extent that the panel's decision was based on

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4/ "That plaintiffs herein are proceeding under 42 U.S.C. §§ 1981, 1983 does not render defendants' seniority system any more susceptible to attack. Congress has clearly placed its stamp of approval upon seniority systems in 42 U.S.C. §2000(e)(2). Whether this section be considered a repeal by implication of any possible contrary construction of §1981, or simply a statement of guiding legal principles, we agree with the Court in Waters that 'having passed scrutiny under the substantive requirements of Title VII, the employment seniority system . . . is not violative of 42 U.S.C. § 1981.'" Slip op. at 6594-95.

§2000e-2(h), we would suggest that, as a matter of sound judicial administration, final action on this petition for rehearing should be postponed until Franks is decided. This seems particularly appropriate in view of the likelihood that Franks will be decided in a manner contrary to the opinion of the panel in this case.[5/] If the petition for rehearing is denied prior to a decision in Franks there would be imposed on all parties the unnecessary cost and delay of filing and answering a petition for writ of certiorari.

The class of persons injured by the defendants' unlawful practices include not only persons who took and failed an examination, but also persons who were discouraged from taking the examinations because of their discriminatory character, persons who were thus deterred from even trying to meet the eligibility requirements for taking the examinations, and persons who were unable to meet discriminatory prerequisites for taking the examinations. The District Court reasonably concluded that the only administratively feasible way to protect the rights of these hundreds of class members was the quota system which it imposed on the excessing process. The panel's decision rules out the only realistic remedy for the violation found earlier by this Court; the Board of Education's plan would provide no relief at all for most of the injured class members. Such a result renders the District Court virtually powerless to perform its duty to grant

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5/ In their briefs and in oral argument, all parties in Franks, the employee, the company and the union, as well as the United States as amicus curiae, took the position that Section 2000e-2(h) does not bar the granting of seniority relief to victims of discriminatory hiring practices.

affirmative relief to eliminate, so far as possible, the effects of past discrimination. Louisiana v. United States, 380 U.S. 145, 154 (1965); cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

CONCLUSION

For the reasons stated above, this Court should reconsider its decision of January 19, 1976, and the case should be set for rehearing en banc. In the alternative, the petition should be held in abeyance pending a decision by the Supreme Court in Franks v. Bowman Transportation Co., supra.

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February 2, 1976

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 1976 I served two copies of the foregoing Petition for Rehearing upon the following counsel of record by depositing same in the United States mail, postage prepaid.

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